

No. 48305-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

JOSE VILLAREAL,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Mary Sue Wilson, Judge  
Cause No. 15-1-00903-0

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether recorded phone calls between Villareal and a party protected by a no-contact order were properly authenticated at trial.
2. Whether there was sufficient evidence to convict Villareal on Count 6.

B. STATEMENT OF THE CASE.

The State accepts Villareal's statement of the substantive and procedural facts of the case.

C. ARGUMENT.

1. The recordings of the telephone calls from Villareal in the Nisqually Public Safety Complex to a party protected by a no-contact order were properly authenticated and the trial court did not abuse its discretion by admitting them.

The State offered excerpts of four telephone calls placed by Villareal from the jail to Kristen Carter, an individual protected by a no-contact order that Villareal was charged with violating. The court admitted them over Villareal's objection that the State had failed to lay a proper foundation. RP 159.

Admission of evidence is within the trial court's "sound discretion" and will not be disturbed on review absent an abuse of that discretion. State v. Stubbsjoen, 48 Wn. App. 139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987). A reviewing court will find an abuse of discretion when the trial court's decision is

manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006), citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based “on untenable grounds” or made “for untenable reasons” if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *Id.* A decision is “manifestly unreasonable” if the court, despite applying the correct legal standard to the supported facts, adopts a view that “no reasonable person would take,” and arrives at a decision “outside the range of acceptable choices.” *Id.* The appellant bears the burden of proving abuse of discretion. State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *reversed on other grounds*, 99 Wn.2d 538 (1983).

ER 901 governs the authentication and admissibility of exhibits. In pertinent part, that rule reads:

Rule 901. Requirement of Authentication or Identification.

(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

....  
(6) Telephone Conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (ii) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

Authentication is a preliminary question and the court may consider evidence, such as hearsay, that might be objectionable under other rules of evidence. State v. Danielson, 37 Wn. App. 469, 471, 681 P.2d 260 (1984); State v. Williams, 136 Wn. App. 486, 500, 150 P.3d 111 (2007) (“In making a determination as to authenticity, a trial court is not bound by the rules of evidence”.); ER 104(a), 1101(c)(1).

The identity of the parties to a telephone call may be established by either direct or circumstantial evidence. Danielson, 37 Wn. App. at 472. Statements made during the conversation itself can be considered for the purpose of authentication. Id. at 471. The court should admit the evidence if the proof is sufficient to allow a reasonable juror to find that the conversation is what the proponent purports it to be. Passovoy v. Nordstrom, 52 Wn. App. 166, 171, 758 P.2d 524 (1988). While self-identification alone is

insufficient to authenticate a phone conversation, that combined with almost any circumstantial evidence is sufficient. Id. The rule does not limit the type of evidence that may support a finding of authenticity. Williams, 136 Wn. App. at 500.

The proponent of the evidence must make only a prima facie showing of the authenticity of the evidence. The court is to consider only the evidence offered by the proponent and disregard any contrary evidence produced by the opponent. 5D KARL B. TEGLAND, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON WASHINGTON EVIDENCE at 513 (2012-2013 ed.); Williams, 136 Wn. App. at 500.

A sound recording, in particular, need not be authenticated by a witness with personal knowledge of the events recorded. Rather, the trial court may consider any information sufficient to support the prima facie showing that the evidence is authentic.

Williams, 136 Wn. App. at 500.

In Villareal's case, the court heard evidence about the telephone system that the Nisqually Public Safety Complex made available to inmates. Calls made from the jail are all preceded by an automated announcement that warns the caller that they are being recorded. RP 127. Each inmate is given a personal identification number (PIN) and assigned an account with Telmate,



the service provider. RP 125-26. In addition, when the account is activated, the inmate must speak his or her name into the system, and voice identification verifies that future calls are indeed made by that inmate. RP 127-28. Telmate has a web-based program that permits authorized personnel to access recorded calls for any specific inmate. RP 124-25. The Telmate program allows a person to search for specific phone numbers called from the jail. RP 130.

Maria Cumero, Villareal's community corrections officer, testified that she had located a phone number that Carter, a protected party, had previously provided to the Department of Corrections. RP 71. That phone number was (206) 427-3580. RP 72. Cumero had used this phone number to speak with Carter at least five times and was able to recognize Carter's voice during those calls. RP 74-75.

As Villareal's community corrections officer, Cumero had access to calls he made from the Nisqually Public Safety Complex. [RP 124]. Cumero reviewed about 50 phone calls made by Villareal while he was in custody during September of 2014. RP 218. Cumero found these calls by searching the Telemate system for Villareal's name. RP 132. She was able to verify that the phone calls listed in Villareal's name were actually made by him because

Cumero recognized his voice. RP 131. The calls also matched Villareal's PIN. RP 133.

There is substantial evidence to suggest that four of these recorded calls included the voices of Villareal and Carter. While reviewing Villareal's calls, Cumero noticed five calls made to the number that Carter had previously provided to the Department of Corrections. RP 153. Cumero listened to those five calls and recognized two of the voices in the calls as belonging to Villareal and Carter. RP 151. After listening to the call recordings again, prior to trial, Cumero stated that she no longer thought that the woman's voice on call number four belonged to Carter. RP 155-56. Given this recognition of error, the State did not allege that call four was evidence of a no-contact order violation. RP 297. While call number four was admitted, it was played by Carter's attorney in an effort to discredit Cumero's testimony. RP 186-87.

Villareal suggests that Cumero's testimony is invalid based on her misidentification of the woman on call number four. However, her mistake was understandable given the low quality of the call four recording, in comparison to the other calls. States Exhibit 1, Call 4. Additionally, it should be noted that Cumero realized her mistake even before she testified. RP 156-57. In

contrast, her confidence that Carter was the female voice on calls one, two, three, and five did not waiver. RP 166. Given Cumero's testimony, the court did not abuse its discretion when it admitted the recordings.

Even if Cumero's testimony is discounted, there is significant evidence from the recordings to support the conclusion that Carter is the female voice heard on calls one, two, three, and five. On the first call Villareal is heard discussing a child with a woman. State's Exhibit 1, Call 1. The woman tells Villareal that the child is "[y]our daughter." Id. When the child comes on the phone, Villareal asks where she is. Id. The girl responds that she is "...at mommy's house." Id. Given that Villareal called a phone number belonging to Carter, RP 153, and the fact that Carter and Villareal have a young daughter together, RP 223, a reasonable conclusion is that the young girl is their daughter, and the female voice is Carter.

During Villareal's second call to the number belonging to Carter, the woman asks Villareal if he is "...going to be able to take Farrah to her doctor's appointment." State's Exhibit 1, Call 2. While under oath, Carter testified that she and Villareal have a daughter together named Farrah. RP 223. From this conversation, it was

reasonable to conclude that the individuals discussing the care of Farrah were her parents: Villareal and Carter.

There is also convincing evidence that Carter is the female voice on call three. On the call, during an argument, Villareal refers to the woman as “Kristin.” State’s Exhibit 1-A, Call 3. The female voice then refers to Villareal as “Mexi.” Id. Given that Kristen is Carter’s first name, RP 211, and that Carter frequently calls Villareal “Mexi,” RP 223, there is little doubt as to the identities of the individuals on the call.

The conversation again turns to a young girl on call five. State’s Exhibit 1, Call 5. While the women does not say the young girl’s name, it is clear that she is referencing her daughter Farrah. Id. This, taken with the fact that the women’s voice in call five is similar to the voice on calls one, two, and three, suggests that Carter is the female voice heard on the phone call.

The conversation topics on each of the four calls, along with Cumero’s sworn testimony as to the identity of the female voice, strongly supports the conclusion that Carter is the female voice on calls one, two, three, and five. Therefore, the trial court was well within its discretion to find that the State had authenticated the recordings.

2. The State concedes that there was insufficient evidence to support Villareal's conviction for violation of a no-contact order on Count 6.

The evidence is sufficient to support a conviction for violation of a no-contact order if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Villareal was charged with seven counts of violation of a no-contact order. CP 38-40. At trial, he was convicted of five of those counts. RP 528-31. Those five counts, counts three through seven, stemmed from phone calls Villareal made from the Nisqually Public Safety Complex. RP 295-97. The State concedes that there was insufficient evidence to convict on count 6.

Prior to trial, the State produced five recordings of Villareal calling a number linked to Carter. RP 18. However, Cumero, who had forwarded those calls to the State, only testified that the female voice on four of those recordings: one, two, three, and five, was that of Carter. RP 166. Cumero conceded that the female voice on recording four, which Cumero had previously thought to be Carter, was not her. RP 186-87. No further evidence of contact between Villareal and Carter was produced to support count 6. Neither was it

suggested that the phone call itself was evidence that Villareal had violated the no-contact order.

Given these facts, there was insufficient evidence to convict Villareal for violation of a no-contact order as to count 6.

D. CONCLUSION.

The court did not abuse its discretion when it admitted phone call recordings from the Nisqually Public Safety Complex into evidence. Therefore, the State respectfully asks this court to affirm Villareal's conviction on counts one through five, and seven. However, the State concedes that there was insufficient evidence to convict Villareal as to count six.

Respectfully submitted this 20<sup>th</sup> day of July, 2016.



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CERTIFICATE OF SERVICE

I certify that I served a copy of Brief of Respondent on the date below as follows:

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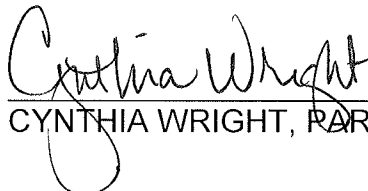
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 25<sup>th</sup> day of July, 2016, at Olympia, Washington.

  
\_\_\_\_\_  
CYNTHIA WRIGHT, PARALEGAL



# THURSTON COUNTY PROSECUTOR

**July 25, 2016 - 1:56 PM**

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